Supreme Court, U.S.
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In The Supreme Court Of The United States

Lawrence Litten — Petitioner

Vs.

Grenada County, Mississippi, Et. Al. — Respondent

Supreme Court Cause No. _____

Fletcher Fly — Petitioner

Vs.

Yalobusha County, Mississippi — Respondent

Petition For Writ Of Certiorari

To The Fifth Circuit Court Of Appeals

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(B.) QUESTIONS PRESENTED FOR REVIEW

1. In a §1983 suit for a "physical taking," "permanent occupation," "per se or categorical taking," or " physical invasion," do the ripeness requirements of Williamson County Regional Planning Comm' v. Hamilton Bank of Johnson City, (cited infra), apply?

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(C.) LIST OF ALL PARTIES BEFORE THE COURT

All parties are listed in the caption of the case.

(D.) TABLE OF AUTHORITIES

1. CASE LAW

(i) Federal

1) US Supreme Court

Andrus v. Allard, 444 U.S. 51, 65 66 (1979)

Armstrong v. United States, 364 U.S. 40, 49 (1960)

Block v. Hirsh, 256 U.S. 135 (1921)

Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910)

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897)

City of Monterey v. Del Monte Dunes, 526 US 687 (1999)

Danforth v. United States, 308 U.S. 271, 284 (1939)

Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998)

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

Fair Assessment in Real Estate Ass'n v. McNary, 454 US 100 (1981)

Jacobs v. United States, 290 U.S. 13, 16 (1933)

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470,517 (1987)

Lingle v. Chevron, 544 US 528,538 (2005)

Loretto v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982)

MacDonald, Sommer & Frates v. Yolo County, 477 U.S 340, 351 (1986)

Monterey v. Del Monte Dunes at Montery, 526 U.S. 687, 727-28 (1999)

Palazallo v. Rhode Island, 533 U.S. 606, 628 (2001)

Penn Central Transportation Co. v. New York City, 438 U.S. 104,124 (1978)

Pumpelly v. Green Bay Co., 13 Wall. 166

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 654 (1981)

San Remo Hotel v. City and County of San Francisco, 545 US 323, 348-52 (2005)

Suitum v. Tahoe Regional Planning Agency, 520 US 725, 733-734 (1997)

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)

Teamsters v. Terry, 494 U.S. 558, 570 (1990)

United States v. Clarke, 445 U.S. 253, 257 (1980)

United States v. Causby, 328 U.S. 256 (1946)

United States v. General Motors Corp., 323 U.S. 373 (1945)

United States v. Petty Motor Co., 327 U.S. 372 (1946)

United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir.2008)

Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F2d 397 (3d Cir. 1990)

Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir.2009)

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir.1991)

Severance v. Patterson, 566 F.3d 490 (5th Cir.2009)

Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F3d 322 (4th Cir.2005)

Tennessee Scrap Recyclers ass'n v. Bredeson, et al, 556 F3d 442 (6th Cir.2009)

Texas Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095 (Cir.1996)

US v. Salvatore, 110 F.3d 1131 (5th Cir.1997)

Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir.2006)

Washington Legal Fdtn. v. Texas Equal Access to Justice Fdtn., 270 F.3d 180 (5th Cir.2001

(ii) State

Ann May Enterprises, Inc. v. Caples, 724 So.2d 1187 (Miss. App.1998)

Long v. Mckinney, 897 So.2d 160, 172 (Miss. 2002)

Statutory Law

(i) Federal

28 USCA § 1331, §1343 AND § 1367
28 USCA § 1254
28 USCA § 1291
42 USCA § 1983

(ii) State

MCA § 65-7-4.1.
MCA§ 65-7-7

(E) BASIS FOR JURISDICTION

(i) The date of the judgment sought to be re viewed is February 23, 2010;

(ii) The only order concerning rehearing was entered on March 12, 2010. It was an order denying Appellants' Motion For Extension of Time to File Petition For Hearing En Banc;

(iii) N/A

(iv) Jurisdiction in the U.S. Supreme Court is proper pursuant to 28 USCA § 1254. Jurisdiction in the Fifth Circuit was pursuant to 28 USCA §1291. Original jurisdiction in the U.S. District Court for the Northern District of Mississippi is asserted under 28 USCA §1331, § 1343, and §1367; and

(v) N/A

(F) PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

(i) Plaintiff/Appellant Fly asserted 42 USCA § 1983 as the vehicle to address the taking by Yalobusha County, Mississippi, of the lengthy strip or strips of land and of approximately 300 yards of a new road built by Fly's brother. Fly asserts violations of the Fifth and Fourteenth Amendments to the U.S. Constitution. Separate state claims are addressed, pursuant to the supplemental jurisdiction of the District Court.

(i) Plaintiff/Appellant Litten asserts 42 USCA § 1983 as the vehicle to address violations under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the U.S. Con stitution. Litten also appended state claims pursuant to the Supplemental Jurisdiction of the District Court.

(ii) The basis of jurisdiction in the District Court is 42 USCA § 1983, 28 USCA §§ 1331, 1343 and 1367.

G) STATEMENT OF THE CASE

Two legal occurrences supply the backdrop for this consolidated cause of action. The announcement of this Court's opinion in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), and the retinue of cases discussing the "ripeness" requirements in Williamson County are certainly well known to this Court. The indisputable fact that the Circuits are now split on this crucial issue is the basis for this Petition.

Secondly, a Mississippi legislative initiative, undoubtedly constitutional on its face and in its intent, was misapplied by two (2) Mississippi counties, Grenada and Yalobusha. It is unknown whether other counties misapplied the law. While it is likely that there were other abuses, it is not relevant to this cause.

The state initiative mentioned, was the passage, administration, and abuse of Mississippi Code Ann. §§ 65-7-4, et seq, County Road Systems. The purpose of the statute was salutary. It required that in the year 2000, each County, by its Board of Supervisors, would create a registry and maps of all county roads, in an effort to clarify what roads were public and which were private. However, the statute required that if a right-of-way were to be added to the prescriptive easement over a historically publicly used road, the County must pay for it (MCA§ 65-7-7). It was not the state's intention to permit the establishment or opening of new roads, but to identify the roads that already existed. See MCA § 65-7-4.1. Unfortunately, many Boards of Supervisors, (pertinently the Grenada and

Yalobusha Boards), used the opportunity to dovetail a multiplicity of purposes from the statute.

Fletcher Fly inherited his land in 2001, after the Yalobusha Board had "registered" CR 161, a gravel road lying almost exclusively on Plaintiff's land. CR 161, Plaintiff confessed, was once, in part, a public road.

Fly had also had "neighbor problems" with four wheelers destroying fledgling pine trees, neighbors getting off the public road onto his property, and one "set" of neighbors using Fly's property off of the County Road as a driveway /shortcut to their property.

In 2002, Fly retained counsel, seeking to close the road. The Walkers (one of the neighbor families), retained Yalobusha County Attorney Hon. John Crow. Mr. Crow represented the Walkers until the morning of a hearing before the Board as to the ownership of a 300 foot portion of the road at the north end of Fly's property, which was the Walkers' southern boundary. The Board granted the Walkers' request to "re-take" the portion of their "driveway" (See below). See (RE 97-98).

It seems that the Board and, hence the County, had abandoned the 300 feet of CR 161 after it "washed out" in or around 1972. (See RE 252-260). While the Board President, Mr. Sims, minimizes Mr. Crow's role (RE 97), Mr. Crow prepared and sent to the Mississippi Attorney General a request for an opinion as to the section <u>without</u> Board Mandate. Mr. Crow asserts that he "lost" the request, recapitulated by the

AAG who wrote the Opinion. (RE 259-60). The AAG quotes Mr. Crow as admitting that the County had not maintained that section of the road for 20 years. (RE 259).

The testimony of John Tillman further refined the County Attorney's "admission" (See RE 252-258). Mr. Tillman owned land along CR 161 well back into the 1960s . By his testimony, he places the portion of the road in question (which was "washed out") as "just after you passed the Magee Hunting Club...," exactly the 300 feet addressed by Mr. Crow and the AAG. (RE 253). Mr. Tillman placed the time of the "washout" as being "when Mr. Earl Moorman was serving as supervisor." (RE 256). "I think it was right after Mr. Frank Pate...." (RE 256-57). The records of Yalobusha County indicate that the change of Supervisor from Mr. Pate to Mr. Moorman occurred in 1972. Mr. Tillman testified that he asked the county to reopen CR 161, but they refused and abandoned maintenance of the road "below Magee's Hunting Club." (RE 257).

Under Mississippi law, Fly contends this pre-1986 abandonment of the road along the 300 foot distance lasted until 2003, from somewhere between 1972 (Mr. Tillman) and 1983 (Mr. Crow). Therefore, the physical invasion that occurred in 2003-04 when the County moved in heavy equipment to "repair" the road was a taking of Mr. Fly's land. Additionally, any land claimed by the county as "right-of-way" other than the roadway itself was taken by this "invasion." The county, also claimed a 50 foot "right-of-way" which had been neither given by Fly or his predecessors in title nor taken by prescription.

This led to the instant lawsuit.

In Litten, the Supervisor of Plaintiff's "Beat" intervened in a boundary dispute between neighbors by trespassing on Litten's land and destroying a one-strand electric fence erected to minimize crop loss to deer. See Complaint, (RE 8, et seq). This "invasion" was accomplished after the County Attorney apprised Plaintiff that the county's "right-of-way," (never purchased by the county or "dedicated" by Litten), was from "center of the ditch to center of the ditch." Upon receipt of this opinion, Litten reset his fence beyond the center of the ditch. Nevertheless, after weeks of negotiation, Litten's County Supervisor, Michael Lott, went onto Litten's property (i.e. went onto Litten's land beyond the "center of the ditch") to upend, roll up and destroy Litten's electric fence.

In both Litten and Fly, Plaintiffs filed Complaints with the respective Boards of Supervisors shortly after the events recorded above. Mr. Litten filed within a few months of Mr. Lott's "invasion." Mr. Fly filed within six (6) months of asking the Board of Supervisors the basis on which they claimed ownership of CR 161, or for "just compensation" in the alternative.

Litten appealed the Board's decision to state circuit court. The Complaint was dismissed as untimely, but upon reconsideration, authority was given by the state court to file an "Inverse Condemnation" suit. Thereafter, the federal Complaint was filed and the state proceeding was dismissed with prejudice. See Long V. Mckinney, 897 So.2d 160, 172 (Miss.

2002), for the proposition that once a court of competent jurisdiction has a case before it, no other court may intervene. Hence, dismissal with prejudice of the state suit was appropriate, if the District Court had jurisdiction.

Both cases allege that the land taken was taken for private purposes. The motions for summary judgment in both cases made no attempt to challenge these allegations. In Fly the trial court correctly asserts that these issues were not properly briefed as neither side cited the elements of "private taking." Nevertheless, the trial court assumed Defendants' Rule 56 burden and granted summary judgment.

Nor did the trial court address Plaintiffs' claims of "temporary taking" under General Motors, Loretto, or Lumas, (all cited infra), asserting to the contrary that "trespass" is a state issue exclusively. With great respect, this is plain error. Such a taking of small amounts of land may also be a violation of the Fourth Amendment's warrantless seizure protections. If the counties took sides in neighborhood issues, as alleged in both Complaints, First Amendment rights of association may be implicated. All of these theories were pled in the courts below.

Both of these suits were brought under 42 USCA § 1983, claiming constitutional torts under the U.S. Constitution. While Litten pursued compensation in the state court by appealing the Board's denial of compensation, the effort was sabotaged by Grenada County. Grenada County Attorney Jay Gore sent notice of the Grenada Board's "decision" rendered

December 11, 2007, by telefax at 4:45 p.m. on Christmas Eve, 2007. Mississippi law permits appeal of Board actions only if the appeal is noticed within twenty (20) days.

Fly, admittedly, never sought state court relief. Both Fly and Litten, have clearly exhausted all administrative remedies, if such exhaustion is pertinent. Hence only the "state judicial exhaustion" requirement is at issue.

ARGUMENT

Petitioners assert that Williamson County's ripeness requirements apply only to regulatory takings. In the alternative, they assert that they fall within the "per se," "physical invasion," or Loretto exception to the Williamson County ripeness rules.

Appellants are entitled, as Justice Connor contended, to continue this action under the "permanent physical invasion" rule of Loretto v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982), cited at Lingle v. Chevron, 544 US 528, 538 (2005). Alternatively, Appellants assert that they are entitled to bring the action, as they have, under § 1983, as a constitutional tort claim, in federal fora not as an Inverse Condemnation claim in state court. See Justice Scalia's concurring opinion in Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 727-28 (1999).

The sole issue presented for analysis concerns the applicability of the ripeness rules of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (hereinafter Williamson County), to a § 1983 suit to remedy a "physical taking" "per se taking," or "categorical tak-

ing." Petitioners assert five arguments for the granting of a Writ of Certiorari in this case:

1. Ripeness considerations were never intended to apply to cases of "physical taking."

2. The Circuits are split on the question.

3. The exceptions to Williamson County, especially Loretto v. Teleprompter Manhatten CATV Corp., 458 US. 419 (1982), clearly take "physical takings" outside of ripeness considerations.

4. The Congress of the United States intended for the Civil Rights Act of 1866 to protect against the taking of land without compensation under color of law by the State and its lesser entities.

5. Scholars of no less eminence than the former Chief Justice of the United States Supreme Court and Mr. Justice Brennan have stated well-reasoned opinions in opposition to the "ripeness" rules of Williamson County.

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The ripeness considerations of Williamson County were never intended to apply to "physical, per se, or categorical takings." We begin with Williamson County, ¶ 35.

[35] We granted certiorari to address the ques-

tion whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. 469 U.S. 815 (1984). Petitioners and their *amici* contend that we should answer the question in the negative by ruling that government regulation can never effect a "taking" within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. id., (Emphasis supplied).

The Court further underlines the distinction in paragraphs 39-41:

[39] As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Throughout the rest of Williamson, viewing the case through the clear lens of the "Physical/Regulatory" dichotomy, the Court continues its careful use of language, limiting the ruling to "Regulatory Taking."

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In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), The Court makes the distinction explicit:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897), prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427(1982). In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393(1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." Id., at 415.

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In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the Court explained the requirement that a takings claim must be ripe.

The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id., at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see Lucas, supra, at 1015, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see Penn Central, supra, at 124. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986). Drawing on these principles, the Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim... .

Further, and more directly on point:

Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule

of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. See Danforth v. United States, 308 U.S. 271, 284 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][I] ("It is well settled that when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property at the time of the taking who is entitled to compensation"). A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner. Id.

Next, the Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), gives this description at Part IV:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. [Em-

phasis Added].

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256 (1946), it is required to pay for that share no matter how small.

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking,"(fn18) and vice versa. For the same reason that we do not ask whether a physical appropriation advances

ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way - often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.(fn19) "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," Penn Central, 438 U.S., at 124. Id., (Emphasis Supplied)

The Circuits are split on the question. See Supreme Court Rule 10 (a) and (c).

There is no cavil that the interpretation of the Fifth Amendment, as applied to the states by the Fourteenth Amendment is a matter of the first importance. Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

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There is no cavil that the interpretation of the Fifth Amendment, as applied to the states by the Fourteenth Amendment is a matter of the first importance. Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

The split in the Circuits causes the application

of the Fifth Amendment to the states to depend not on law, but on geography. Since uniformity of constitutional interpretation is crucial to a healthy federalism, this case takes on great importance. Petitioners urge this Court to grant certiorari.

The Fifth Circuit is in a distinct minority among the circuits. The Fifth circuit is joined in the minority by the Seventh and Eleventh Circuits in requiring "state judicial exhaustion" in a physical takings case. The applicable holdings for the Fifth Circuit are Severance v. Patterson, 566 F.3d 490 (5th Cir.2009) and Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir.2006); the Seventh Circuit similarly opines in Greenfield Mills v. Macklin 361 F.3d 934 (7th Cir.2004); as does the Eleventh Circuit in Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir.2002) and Gulf Power Co., 187 F.3d 1324 (11th Cir.1999).

All other Circuits have honored the Williamson County physical/regulatory distinction:

First Circuit - Franklin Memorial Hosp. v. Harvey, 575 F3d 121 (1st Cir.2009);

Second Circuit - Cablevision Systems Corp. v. FCC, 570 F3d 83 (2d Cir. 2009);

Third Circuit - Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F2d 397 (3d Cir. 1990), (overruled on different grounds by Yee v. City of Escondido, 503 U.S. 519 (1992);

Fourth Circuit - Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F3d 322 (4th Cir.2005);

Sixth Circuit - Tennessee Scrap Recyclers Ass'n v. Bredeson, et al, 556 F3d 442 (6th Cir.2009);

Eighth Circuit - Hawkeye Commodity Promotions v. Vilsack, et al, 486 F 3d 430 (8th Cir.2007);

Ninth Circuit - McClung v. City of Sumner, 548 F.3d 1219 9th Cir.2008);

Tenth Circuit - Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir.2009);

Federal Circuit - Casitas Municipal Water District v. U.S., 556 F.3d 1329 (Fed Cir.2009); and D.C. Circuit - Building Owners & Managers Ass'n v. FCC, 254 F.3d 89 (D.C. Cir.2001) (distinction recognized, but not pertinent).

As to the geographical distribution of the various opinions, the Seventh Circuit is the only exception to a "deep South" minority. It cannot be gainsaid that this geographic pattern parallels, (albeit imprecisely), the two circuits that comprise most of the seceding states of the old Confederacy, which states historically renounced federalism in favor of a radical states' rights stand. However, Petitioners do not assert a causal connection, being aware of the fallacy "POST HOC ERGO PROPTER, ¶ HOC."

The split in the Circuits on such a crucial issue as interpretation of the Fifth Amendment's Takings Clause would by itself justify the granting of certiorari. In addition to the pronouncements of Williamson County, however, stare decisis allegiance to Loretto

v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982), (hereinafter, "Loretto"), is called into play as well.

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The Loretto exception for "physical taking," no matter how small, is key to the issue of "ripeness" and, hence, jurisdiction. As Justice O'Connor pointed out in her introductory paragraph to Yee v. City of Escondido, op cit at 522-23:

> The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164,3171, 73 L.Ed.2d 868 (1982). But where the government merely regulates the use of property, compensation

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> is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g., Penn Central Transp. Co. V. New York City, 438 U.S. 104, 123-125, 98

S.Ct. 2646, 2659, 57 L.E.d.2d 631 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

The application of the Fifth Amendment to the states through the Fourteenth Amendment is crucial to our analysis. This High Court has gone well out of its way to validate Loretto twenty-three times. This validation by citation includes the application to the states. See Loretto at 427.

In the cases at bar, Petitioner Litten was subjected to destruction of a fence on an unpurchased "right of way" lien. He additionally suffered the destruction of crops by the spraying and drift of potent pesticides to the alleged "right of way."

Petitioner Fly was quite literally subjected to a "physical invasion" as well. Yalobusha County sent in a small army of heavy machines with their operators to "rebuild" the last 300 yards of an old gravel road. Fly contends that the County took the wrong 300 yards, using a logging road built by Petitioner's brother instead of the original roadbed. Fly was also required to remove a cabin from the unpurchased "right of way." Several tons of gravel were permanently left on Fly's land. His right to prohibit entry to the "builders" or any other public driver was also taken, since the road lying exclusively on Fly's land ended at his most distant boundary from its origin.

Fly's plight was complicated by the representation of Fly's benefitting neighbors by the attorney for the Board of Supervisors. The benefitting client had the privilege of a "drive-way" to her property, (she had other means of ingress and egress), without the continuance of the historic road thereon. Other local land-owners had requested maintenance of the road as early as the 1970's, to no avail, leading Fly to claim preferential treatment for the Board attorney's private clients. This patent preferential treatment further led to a claim of "taking" for private purpose in violation of the Fifth Amendment. The land taken, 300 yards at the boundary of Fly's property and a claimed fifty-foot right of way along the length of the road, constitute a permanent occupation under Loretto at 430.

Similarly, Litten is unable to prevent Grenada County from spraying pesticides near his organic crops or to protect those crops by placing a fence on the "right of way." Hence, a long narrow right of way is "permanently occupied" by the County.

As Justice Marshall said in summary of near contemporaneous cases by the High Court:

> Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special, and have not repudiated the rule that any permanent physical occupation is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

Loretto, at 432. Similarly:

> In short, when the "character of the governmental action," Penn Central, 438 U.S. at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

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> whether the action achieves an important public benefit or has only minimal economic impact on the owner. Id. 434-35

In Fly's case, the "occupation" is patent. In Litten's case, the continuing use of the right of way by the County by spraying and by dictating what may or may not be erected on his land are equally confiscatory.

It should be noted in closing this argument that the Fifth Circuit has never, except under the compulsion of this Court's mandate, given controlling authority to Loretto vis-a-vis "physical taking" jurisprudence. Petitioners find one mandated citation in Washington Legal Fdtn. v. Texas Equal Access to Justice Fdtn., 270 F.3d 180 (5th Cir.2001). Other than the IOLTA case, the Fifth Circuit has cited Loretto in one criminal case, US v. Salvatore, 110 F.3d 1131 (5th Cir.1997); in an irrelevant footnote in Texas Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095 (Cir.1996), an opinion written by a District Judge setting by designation; and in dicta discussing the "character of government action." The "takings" claim was decided

on the basis that there "was no taking." Loretto was distinguished as applying only to "permanent physical occupation of property," not to the ordinance in question. Further, the takings claim was dismissed as unripe under Williamson County. Samaad v. City of Dallas, 940 F.2d 925 (5th Cir.1991).

That is the extent of the Fifth Circuit's citation of Loretto. The Eleventh and Seventh Circuits analysis of Loretto is similarly sparse. In fairness, however, the Third Circuit has rarely addressed Loretto, though supporting the doctrine for which it stands.

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Congress intended the Civil Rights Act of 1866 to extend to the taking of land without just compensation under color of state law. In Section 1 of the original act, Congress specifically included the right "to inherit, purchase, lease, sell, hold, and convey real and personal property... any law statute, ordinance, regulation, or custom, to the contrary notwithstanding." Civil Rights Act of 1866, Section 1. Section 3 of the same Act gives the district and circuit courts of the United States "exclusive" jurisdiction over "offenses committed against the provisions of this act...." Section 10 authorizes appeal to the Supreme Court of the United States.

More recently, in Younger v. Harris, 401 US 37 (1971), the Supreme Court restated that § 1983 suits require no exhaustion of state remedies. See fn.5. The single exception to this rule has been applied in recent years since the passage of the Prison Litigation Reform Act of 1995.

See Woodford v. Ngo, 548 US 81, 93(2006).

Also of recent vintage is Justice Kennedy's opinion in City of Monterey v. Del Monte Dunes, 526 US 687 (1999). The primary question in Del Monte Dunes was whether, and under what circumstances, a § 1983 suit was amenable to jury decision. The answer was based on a finding that the issue of finality had been accomplished as a result of repeated efforts by Del Monte Dunes to reach a reasonable development plan for its efforts, all such efforts being rebuffed by the state.

While it is true that Del Monte Dunes is a "regulatory taking" action based on a lack of California law for temporary regulatory takings, the language used by Justice Kennedy to characterize the nature of the claim is instructive. It is important to note the Williamson County conclusion that a "physical taking" is different because it already partakes of finality as to the amount of damage caused. See Palazzolo v. Rhode Island, 533 US 606, 617 (2001), (also written by Justice Kennedy).

Justice Kennedy, in Del Monte Dunes, at 710-11, opines:

> Here Del Monte Dunes sought legal relief. It was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. See First English, 482 U.S., at 308-311. The constitutional injury alleged, therefore,

is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. See Williamson, 473 U.S., at 194-195. Because its statutory action did not accrue until it was denied just compensation, in a strict sense Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy. See, e. g., Teamsters v. Terry, 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law' ") (quoting Curtis, 415 U.S., at 196).

This difference renders the analogy to condemnation proceedings not only unhelpful but also inapposite. When the government takes property without initiating condemnation proceedings, it "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." United States v. Clarke, 445 U.S. 253, 257 (1980). Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner "at a significant disadvantage." Id., at 258; cf. id., at 255 ("There are important legal and practical differences between an inverse condemnation suit and

a condemnation proceeding"); 84 Stat. 1906, § 304, 42 U.S.C. § 4654 (recognizing, at least implicitly, the added burden by providing for recovery of attorney's fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary condemnation cases). Id, at 712.

At the risk of repetition, Petitioners repeat the physical/regulatory distinction. The finality of the taking in the instant case is patent. The counties are not giving the land back, and they have no intention of granting "just compensation" to Petitioners. Hence, the Court's § 1983/condemnation distinction brings the case at bar within the "constitutional tort" remedies of §1983.

Finally, as to this argument, there is the well-reasoned concurrence of the late Chief Justice Rehnquist in San Remo Hotel v. City and Conty of San Francisco, 545 US 323, 348-52 (2005). While Petitoners will analyze the concurrence at more length in the fifth and final argument, for purposes of this discussion one sentence at p. 349 will suffice. "It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before bringing a federal takings claim."

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Williamson County's ripeness requirements have engendered controversy from their origin. Though the case at bar does not require a thorough review of the doctrine, the Court here has the

opportunity to correct one of the more egregious misinterpretations related to Williamson County.

While there has been substantial criticism in the scholarly community of Williamson County and its progeny, Petitioners will focus on the scholarly opinions of two of this Court's great minds, Former Chief Justice Rehnquist and Former Justice Brennan. The late Chief Justice, of course, suggested revisiting Williamson County ripeness standards in his concurrence in San Remo Hotel, joined by Justices O'Connor, Kennedy and Thomas. The former Chief Justice begins by outlining the Williamson County requirements and reminding his colleagues that while Williamson County was purported to draw its holding from the Fifth Amendment, "ripeness" standards are not intrinsic to the Amendment. However, in Suitum v. Tahoe Regional Planning Agency, 520 US 725, 733-734 (1997), the exhaustion requirements both administrative and state judicial exhaustion were called "prudential."

Chief Justice Rehnquist criticizes the "judicial exhaustion" requirement's being analogized to state tax issues. See Fair Assessment in Real Estate Ass'n v. McNary, 454 US 100 (1981). His objection is based on a lack of a history of comity with state courts on Fifth Amendment controversies. "In any event, the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, [internal cites omitted]..., or the Equal Protection Clause,

[internal cites omitted].... In short, the affirmative case for the state-litigation requirement has yet to be made." Id, at 350-351.

He further attacks the "state-litigation requirement" as creating "anomolies." He acknowledges that the constitutionally protected right to "just compensation" cannot effectively even be brought in federal court.

He sees no reason "why federal takings claims in particular should be singled out to be confined to state courts, in the absence of any asserted justification or congressional directive." Id, at 351.

Finally, the distinguished jurist concludes with a plea for the Court to revisit Williamson County in an appropriate case. His particular focus is on the "state litigation," the essential issue in the case at bar.

This case provides an opportunity for this Court to revisit Williamson County, at least to clarify whether the state litigation requirement applies to physical takings. Petitioners pray that the Court will take this opportunity to review Williamson County. Petitioners are proud to be in the company of no less eminent a legal mind than that of the former Chief Justice.

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Petitioners would make one final argument before closing. This argument is no more than a different lens from which to view a takings claim. The argument comes from Justice Brennan's dissent in San

Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 654 (1981). The different approach suggested by Justice Brennan is easily summarized in his own words. " the Fifth Amendment is not precatory; once there is a 'taking' compensation must be awarded." As authority for this position, Justice Brennan cites Jacobs v. United States, 290 US 13(1933).

This new lens certainly supports Justice Kennedy's Del Monte Dunes distinction between eminent domain and Section 1983 suits. If further supports his contention that "Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation." Del Monte Dunes op cit, at p.710.

In the case at bar, this critical point is well-illustrated. In the Litten cause, Litten had previously been subjected to an unconstitutional taking and was vindicated by the District Court. Additionally, he was engaged in a dispute with a neighbor who requested that the Supervisor in their Beat remove Litten's fence. Hence, in addition to "just compensation." Litten sought damages for the destruction of the fence as well as the "taking " claim. He further seeks damages for the insult.

Petitioner Fly claims a private taking by the county for the benefit of the County Attorney's private client. In addition, he actually suffered a "physical invasion" by a team of public road builders who left the strips of land taken "permanently occupied." In this regard, he was required by the county to remove a cabin from "the county's right-of-way."

Both Litten and Fly have suffered the uncompensated loss of their authority to exclude third parties from the parcels taken. Under Mississippi law, in fact, by continual use of a public right of way or easement, a third party may obtain a private easement in his or her own right, even if the public easement has been abandoned. See Ann May Enterprises, Inc. v. Caples, 724 So.2d 1187 (Miss. App.1998). Hence, the stakes are heightened, particularly as to Petitioner Fly, who bears the sole burden of a public road through his land only, for the sole benefit of his abutting neighbor. Mr. Litten, as a practical matter has lost a fence, all protection of his crops against (third party?) intruding deer, and loss of his ability to prevent third parties from parking along his boundary on both sides of the road.

The land of both petitioners having been taken without just compensation by physical occupation, their right to compensation is not precatory, it is mandatory. Since the extent of the "taking" can be easily defined, the rationale of Williamson County as to the physical/regulatory distinction places the actions under federal jurisdiction to enforce the mandate of the U.S. Constitution.

Appellants urge that the question of "judicial exhaustion," is a misunderstanding of the "non-precatory" nature of the Fifth Amendment. This misunderstanding is clearly addressed in the clear language in Palazallo v. Rhode Island, 533 U.S. 606,628 (2001):

"In a direct condemnation action, or when a State has physically invaded the property without

filing suit, the fact and extent of the taking are known. A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained."

The same question as to the precatory nature, vel non, of the Takings Clause is addressed in Justice Stephens' dissent in Palazzallo in which he takes the argument a step farther. His conclusion is that due to the "taking" having occurred upon passage of the questioned regulation, the damage is already done and must be paid with or without administrative or state judicial exhaustion. This dissent is not supported by any other jurist, perhaps because it seeks to diminish the Physical/Regulatory distinction, most particularly the Williamson ruling, requiring exhaustion of administrative and judicial processes for "regulatory" takings. See also: Tahoe-sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 US 302, 321-23 (2002).

The distinction between physical and regulatory takings cases has existed since at least 1922. Williamson County did more to widen the gap between the two than any other case from the High Court. The current trend is to re-unite the two poles, at least in certain per se, or categorical regulatory contexts, permitting initial federal jurisdiction once a taking has occurred. As to "physical takings," with all respect, Appellants assert that the law has not changed since 1897 when the Supreme Court acknowledged the application of the Fifth Amendment to the states through the Fourteenth Amendment.

CONCLUSION

For all of the reasons outlined above and for others to be presented at argument (if permitted), Petitioners pray for grant of a Writ of Certiorari to the Fifth Circuit. And Petitioners pray for general relief.

Respectfully Submitted this 27 day of JULY, 2010.

LAWRENCE LITTEN

FLETCHER FLY

BY: /s/ _____

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IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE LITTEN PETITIONER

VS

GRENADA COUNTY, MISS., ET AL. RESPONDENT

SUPREME COURT CAUSE NO._____

FLETCHER FLY PETITIONER

VS

YALOBUSHA COUNTY, MISS. RESPONDENT

CERTIFICATE OF SERVICE

I, Stewart Guernsey, attorney for the Petitioner's, do hereby certify that I have this date served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals on the following persons:

Michael Wolfe, Esq.
P.O. Box 1163
Jackson, MS.

John Crow
203 Wagner St.
Water Valley, MS. 38965

This the 27 day of JULY, 2010.

/s/

STEWART GUERNSEY

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

Sworn to and subscribed before me this 27 day of JULY, 2010.

/s/
NOTARY PUBLIC

MY COMMISSION EXPIRES

IN THE SUPREME COURT OF THE
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CERTIFICATE OF LENGTH

I, STEWART GUERNSEY, do hereby Certify that the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals herein contains 6,672 words.

/s/

STEWART GUERNSEY

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

This the 27 day of JULY, 2010.

/s/

NOTARY PUBLIC

MY COMMISSION EXPIRES